

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RALPH BUCK PHILLIPS,

Plaintiff,

-v-

9:12-CV-609 (NAM/CFH)

T. LAVALLEY, et al.,

Defendants.

APPEARANCES:

RALPH BUCK PHILLIPS
06-B-3437
Upstate Correctional Facility
P.O. Box 2001
Malone, New York 12953
Plaintiff *Pro Se*

ERIC T. SCHNEIDERMAN, Attorney General for the State of New York
RICHARD LOMBARDO, ESQ., Assistant Attorney General
The Capitol
Albany, New York 12224-0341
Attorney for Defendants

Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

In this *pro se* inmate civil rights action, defendants move (Dkt. No. 33) for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff did not submit opposition to the motion. Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge Christian F. Hummell issued a Report-Recommendation and Order (Dkt. No. 35) recommending that the motion be granted in part and denied in part.

Neither party has submitted an objection. The docket reflects that plaintiff has twice refused service of the Report-Recommendation and Order (Dkt. No. 36). “As a rule, a party's

failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point." *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003). A *pro se* litigant must be given notice of this rule, see *Frank v. Johnson*, 968 F.2d 298, 299 (2d Cir. 1992); here, however, the Report-Recommendation and Order provides the proper notice, and any failure to receive notice is due to plaintiff's conduct.¹

The Court has reviewed Magistrate Judge Hummel's Report-Recommendation and Order – which thoroughly addresses this 60-page handwritten complaint – and accepts it in its entirety.

It is therefore

ORDERED that the Report-Recommendation and Order (Dkt. No. 35) is accepted; and it is further

ORDERED that defendants' Rule 12(b)(6) motion (Dkt. No. 33) is granted in part and denied in part as follows:

Dismissal is denied as to:

- Plaintiff's Eighth Amendment excessive force claims against defendants James and Lee;
- Plaintiff's Eighth Amendment deliberate indifference claims regarding his mental health treatment against defendants Waldron, Berggren, and Savage; and
- Plaintiff's Eighth Amendment deliberate indifference claims regarding his medically approved insoles against defendants Boudrieau, and Martin; and

Dismissal is otherwise granted as to all other claims and defendants;

¹ Although the Report-Recommendation and Order sets forth plaintiff's address as Clinton Correctional Facility (plaintiff's place of incarceration when the complaint was filed), this is merely a clerical error. It is clear from the docket (see Dkt. No. 36) that the Report-Recommendation and Order was properly mailed to plaintiff at Upstate Correctional Facility, where he has been housed since no later than August 1, 2012 (see docket entry for August 1, 2012; also see *Phillips v. LaValley*, 9:12-CV-610, Dkt. No. 20.)

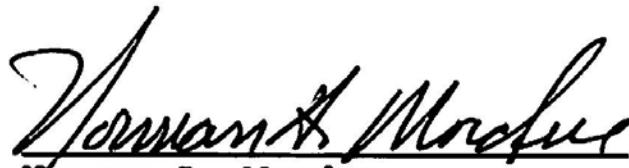
and it is further

ORDERED that the following defendants are dismissed from the case: T. LaValley; W. Allan; Menard; E. Bouissey; B. Tucker; D. Amo; Bezio; C. Delutis; J. Delisle; P. Hutti; C. Trudeau; and Susan M. Rocque; and it is further

ORDERED that the Clerk of the Court is directed to serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: March 24, 2014
Syracuse, New York


Norman A. Mordue
Senior U.S. District Judge

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